BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules	)	CS Docket No. 98-120

REPLY COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby replies to the comments submitted in response to the above-captioned Second Further Notice of Proposed Rulemaking ("*Notice*").[1] The comments provide ample reasons why cable operators' must-carry burdens should not and cannot be expanded. Even those who support expanded must-carry requirements demonstrate, if only by the weakness of their arguments, that such expanded obligations are unnecessary and unlawful.

I. INTRODUCTION & SUMMARY.

Unsurprisingly, in response to the *Notice*, some in the broadcast industry jumped at the chance to seek expanded must-carry rights. Predictably, broadcasters expressed enthusiastic support for reopening the Commission's unanimous rulings in 2001 and 2005 that dual carriage is unconstitutional and for reading the word "material" out of the "no material degradation" standard enacted by Congress. Inevitably, however, broadcasters advanced no persuasive factual or legal reasons why the Commission's prior conclusions and existing rules were wrong. Taken as a whole, the first-round comments clearly demonstrate that: (1) the Commission got it right in

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[1] *In re Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Commission's Rules*, Second Further Notice of Proposed Rulemaking, 22 FCC Rcd. 8803 (2007) ("*Notice*").

its prior digital television ("DTV") must-carry orders;[2] and (2) there is no need to adopt the *Notice*'s dual-carriage and material degradation proposals. As even one broadcaster acknowledges, "market and other forces will achieve the desired results, in all likelihood, faster than most parties expect."[3]

Adoption of the dual-carriage proposal would cause much more consumer harm than benefit. Among other ills, it would delay and distort consumers' transition to digital technology. Moreover, as cable operators and programmers demonstrated, there are numerous factual, policy, statutory, and constitutional flaws with the Commission's proposal. As the one commenter that is *both* a cable operator and a broadcaster pointed out, the dual-carriage proposal would be "bad policy" and is riddled with constitutional concerns.[4]

The record provides no basis for the Commission to reconsider the unanimous decision it reached two years ago that dual must-carry *is not* required by the statute and *is* unconstitutional. Only the National Association of Broadcasters ("NAB") attempts to explain why it believes the Commission's proposal conforms to the statute and Constitution, but NAB's arguments are unavailing. NAB's statutory "analysis" wholly ignores the express acknowledgement in the Communications Act that the viewability requirement can be met by a cable operator "offer[ing] to sell or lease" converter boxes to consumers; the statute does not require a cable operator to provide customers with converter boxes for free or to carry duplicative must-carry programming

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2 *See generally In re Carriage of Digital Television Broad. Signals: Amendment to Part 76 of the Commission's Rules*, First Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 2598 (2001) ("*2001 DTV Order*"); *In re Carriage of Digital Television Broad. Signals: Amendments to Part 76 of the Commission's Rules,* Second Report & Order and First Order on Reconsideration, 20 FCC Rcd. 4516 (2005) ("*2005 DTV Order*").

3 Entravision Comments at 5. For purposes herein, unless otherwise designated, all citations to comments are to filings made in CS Docket No. 98-120 on July 16, 2007.

4 Block Communications Comments at 1, 3-4.

in two different formats even if there is but a single customer on the system who chooses not to buy or lease a converter box -- which is the standard proposed in the *Notice*. To meet the viewability requirement, cable operators need only offer to sell or lease converter boxes to consumers, which every cable operator currently does.

NAB's constitutional arguments offer not a single important governmental interest that would be furthered by dual must-carry. In addition, despite NAB's continuing effort to convince the Commission that First Amendment concerns can be brushed aside because of increases in cable capacity, the clear evidence is that dual carriage would impose enormous burdens on cable operators, which is why the Commission should -- as before -- reject the broadcasters' claim and reaffirm that dual carriage, like any expansion of carriage mandates, unconstitutionally burdens cable operators' First Amendment rights. And NAB's efforts to sidestep the constitutional problem by claiming that cable operators may *choose* between dual carriage or providing all of their customers with converter boxes does not even pass the laugh test, since the purported option of providing each and every customer a converter box for each and every TV receiver is no option at all for most cable companies.

The proposal to revise the Commission's "material degradation" standard to eliminate the concept of materiality fares no better. Although NAB claims that a "comparative standard alone is not sufficient," neither it nor any other commenter provides an explanation as to why the comparative standard the Commission found was required by the statute six years ago now suddenly fails to adequately protect broadcasters' signals from being "materially degraded." NAB is unable to point to a single instance during those six years in which a broadcaster has complained that its digital signal was degraded by a cable operator. Nonetheless, NAB advocates a new standard that directly conflicts with the statutory language and would prevent

cable operators from using for broadcast signals the kinds of innovative capacity management technologies they routinely use for transmission of all other video programming.

The Commission has far bigger DTV transition "fish to fry" that it *needs* to address -- and soon. Rather than spinning its wheels and revisiting well-settled rules and prior decisions, the Commission should be tending to unfinished business -- including the long-neglected establishment and enforcement of meaningful public interest requirements for digital broadcasting and the planning and administration of the most important spectrum auction in history. Meanwhile, Comcast and other cable operators stand ready to do their part to minimize any consumer disruptions that will be caused by the broadcasters' digital transition. Comcast has powerful marketplace incentives to satisfy its customers' and potential customers' wants and needs. The public would be far better served if Comcast and other cable operators did not have to waste precious resources working to fend off a steady stream of ill-considered proposals for new and unnecessary regulations.

II. COMMENTERS PROVIDE NO BASIS FOR INCREASING MUST-CARRY BURDENS.

Despite broadcasters' assertions to the contrary, the latest dual-carriage proposal is neither necessary nor, by any means, "plainly permissible both as a matter of statutory and constitutional law."[5] In fact, of the six broadcaster commenters, only NAB so much as mentions the statutory or constitutional grounds for the Commission's proposals -- and it addresses them unconvincingly. As cable operators and programmers demonstrate in their comments, there are

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[5] NAB Comments at 10.

numerous factual, policy, statutory, and constitutional flaws with the proposal to require cable operators to carry every must-carry broadcast signal in duplicate.[6]

A. The Record Provides No Factual or Policy Bases to Invoke "Viewability" as Justification for Imposing a Dual-Carriage Requirement.

The Commission's dual-carriage proposal is based on flawed logic and unfounded assumptions, and supporters of the proposal provide no evidence to prove otherwise. There is simply no need for the Commission to interfere with the marketplace as proposed in the *Notice*. As NCTA explained,

> Carriage of the primary digital signal . . . is the only thing the statute requires of cable operators. This is not to say that cable operators will necessarily choose to provide must-carry signals in only a digital format. Cable operators have every interest in making the digital transition as seamless as possible for their customers. They have strong marketplace reasons to continue to provide signals in a format that their customers desire – or lose that customer to a competitor who does. If significant numbers of customers wish to receive broadcast signals in an analog format, operators will have every incentive to provide them.[7]

Comcast emphasized that the marketplace is already addressing the needs of consumers, and that ever-increasing competition will only continue to ensure that consumers' demands are met.[8] There is no evidence that cable operators will not provide what their customers need to view broadcast signals.

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[6] *See* NCTA Comments at 2 (The *Notice* "proposes an unlawful command-and-control approach over the cable operator's property, using the broadcast digital transition as [a] cloak to disguise a perpetual violation of the Constitution."); Comcast Comments at 1 ("These proposals are in direct conflict with prior Commission determinations; they are illogical; they are contrary to the law and the Constitution; and they would hurt rather than help American consumers."); Time Warner Comments at 1 ("[A]ny dual carriage requirement would constitute poor policy, would violate the First Amendment rights of cable programmers (who are not favored with preferential carriage rights) as well as cable operators, and is not statutorily compelled."); Discovery Comments at 2 ("The Commission's proposed interpretations cannot be reconciled with the Act's language or intent."); ACA Comments at 1-2 ("Far from encouraging the efficient delivery of digital signals, these expensive, burdensome -- and, in some cases unconstitutional -- approaches to the DTV transition could eliminate independent MVPD competitors from the small and rural markets served by ACA's members.").

[7] NCTA Comments at 8 (emphasis omitted); *see* Comcast Comments at 16-20.

[8] *See* Comcast Comments at 16-20.

The evidence submitted in the record shows that, rather than benefiting consumers, "there would be *real* harms associated with adopting the Commission's proposal."[9] Such harms would include increased costs to consumers for cable service and equipment, reduced programming diversity, a slower transition to digital by consumers and the cable industry, and less video competition. Specifically, the Commission's proposal "would seem to obligate [a cable operator] to provide a [CableCARD-compatible] set-top box for each analog television set," which "could easily add $5-$15/month or more to the cost of basic cable."[10] Moreover, "[t]he Commission's proposal would decrease diversity of voices, reduce programmer investment, and lessen public interest in the digital transition -- all contrary to the result Congress intended and sought to promote."[11] "Any spectrum allocated to duplicative must-carry signals is unavailable to other services that consumers may value more highly."[12] The Commission's proposal would "perversely prolong consumers' reliance on analog technology."[13] "If the Government's objective is to encourage digital transmission, it should encourage consumers to obtain digital

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[9] Comcast Comments at 16; *see* Time Warner Comments at 4 ("Under the proposed dual carriage requirement, consumers would lose.").

[10] Block Comments at 4-5.

[11] Discovery Comments at 5. As Discovery pointed out, dual carriage of duplicative broadcast signals will leave less capacity for independent programmers, which would then be less likely to be able to secure carriage for new HD channels and other programming desired by viewers; independent networks will inevitably invest less, the supply of desirable programming will decrease, and public support for the digital transition will wane. *See id.* at 6-8. "The only certain result of forcing cable operators to carry duplicative broadcast channels is to ensure that innovative non-broadcast programming will be crowded out." *Id.* at 8.

[12] Time Warner Comments at 4; *see* Comcast Comments at 16 ("It would directly and immediately diminish the bandwidth that cable operators can use to meet evolving consumer needs for programming and other services; it would also impede video competition."); NCTA Comments at 19 ("The ever-expanding space that would be consigned to must-carry signals comes at the expense -- and First Amendment rights and interests -- of cable operators, programmers, and their customers.").

[13] Comcast Comments at 20 & n.54; *see also* NCTA Comments at 18 ("In addition to the capacity squeeze, operators would incur the additional costs and obligation of converting a signal to create a second stream of a broadcaster's programming on its network and then carry both streams *indefinitely*.") (emphasis in original).

tuners . . . . [T]he availability of [broadcast] programming to subscribers without a digital tuner would make it less necessary to obtain digital tuners."[14]

Supporters of the dual-carriage proposal reach in vain for a justification to regulate. For example, NAB's contention that, absent adoption of dual must-carry, cable operators would have "the power to pick winners and losers among digital broadcast stations" is flatly wrong.[15] "[W]inners and losers among digital broadcast stations," or for that matter any programming network, will not be determined by whether those stations' or programming networks' are carried in digital or analog. Rather, winners and losers will be determined by the quality of the programming those stations provide. As Time Warner explained, "[n]umerous cable programmers not blessed with preferential carriage rights are carried only on digital tiers, yet they have thrived."[16] *Most* of the programming networks that Comcast carries and *all* of its video-on-demand content, are available *only* in digital.

To support its contention that dual carriage is consistent with Congressional intent, NAB reaches even further and misconstrues statements made by the National Telecommunications and Information Administration ("NTIA"). NAB interprets language on the NTIA website to assert that NTIA "has publicly stated that it *assumes* that cable operators will ensure that subscribers with analog sets continue to receive local broadcast stations" without the use of converters, which NAB spins as support for the *Notice*'s dual-carriage proposal.[17] Unfortunately for NAB, its spin slams directly into the fact that John Kneuer, the Assistant Secretary for Communications

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14 Time Warner Comments at 9.

15 NAB Comments at 9.

16 Time Warner Comments at 10.

17 NAB Comments at 6 (emphasis in original).

and Information and Administrator of NTIA, has stated his skepticism about dual-carriage requirements, warning that requiring multiple cable carriage of broadcast stations could ignite First Amendment issues that interfere with the transition to digital television.[18]

Even potential beneficiaries of the dual-carriage proposal find it flawed. For example, Entravision -- harkening back to the "original 85 percent market penetration threshold established by Congress" that was to be used to determine when analog broadcasting (not analog cable carriage) would cease -- proposes to mandate dual carriage until 85% of a cable operator's subscribers have a converter box.[19] This concedes -- implicitly, but unmistakably -- that the *Notice*'s proposal to mandate dual carriage until *all* cable customers choose to obtain a converter box for every one of their analog TVs is unreasonable: "The 85 percent-by-zip code threshold . . . represents an effective means available to the Commission to ensure that 'no class of subscribers' is unfairly excluded from the DTV Transition while imposing *reasonable* requirements upon cable operators."[20] Although Entravision attempts to make the dual-carriage proposal more reasonable, the Commission has no authority to engage in this sort of legislative line-drawing.[21]

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[18] *See* David Hatch, *NTIA Chief Analyzes FCC Cable Plan*, Nat'l J., May 8, 2007 ("'Any examination of must-carry has always brought with it arguments and concerns over various constitutional issues,' Kneuer said. 'Entering into a heavy First Amendment debate in an area where more certainty, rather than less, would be good, is something I would think about if I were in [the FCC's] position.'"), *available at* http://www.njtelecomupdate.com/2007/05/by_david_hatch_tuesday_may.html.

[19] *See* Entravision Comments at 4-5.

[20] *Id.* at 6 (emphasis added).

[21] It also bears emphasis that Congress effectively repealed its own 85% standard by establishing a "hard date" of February 19, 2009, in the Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 3002, 120 Stat. 4, 21 (2006).

B. Commenters Fail To Cite Any Statutory Authority That Would Allow the Commission To Adopt Its Dual-Carriage Proposal.

NAB claims that the "Commission has a clear statutory mandate for requiring cable operators to ensure that must-carry channels are viewable after the DTV transition by all of their subscribers."[22] But that is not the issue. The relevant question is whether cable operators can meet the "viewability" requirement by offering their customers converter boxes to buy or lease, as the Communications Act expressly contemplates,[23] or whether they must carry both analog and digital versions of each broadcaster's signal until every last customer has chosen either to buy or lease a converter box for every analog TV they have connected to the cable system.

No broadcaster offered any credible legal analysis to show that the Commission has the statutory authority to mandate that the "viewability" requirement can only be met with dual carriage or when all cable customers actually choose to buy or lease a converter box. The section of NAB's comments that explains why dual carriage is "plainly permissible as a matter of both statutory and constitutional law" is stunning for its failure to cite the statute even once, discuss the statutory language, or tie the proposal to the structure, history, or purpose of the statute.[24] And, although NAB correctly notes in a different section that "[t]he Cable Act's viewability requirement certainly contemplated that cable operators could have subscribers who do not have the capability of viewing all local must-carry signals,"[25] NAB again ignores the language of the statute that provides a specific remedy: that cable operators "*offer* to sell or lease

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22 NAB Comments at 7.

23 *See* 47 U.S.C. § 534(b)(7).

24 *See* NAB Comments at 10-12.

25 NAB Comments at 12.

. . . a converter box" to their customers.[26] Instead, NAB urges the Commission to "requir[e] cable operators that elect not to downconvert broadcasters' digital signals after the transition *to provide* converter boxes to their subscribers with analog receivers."[27] The Communications Act, however, does not require, nor does it permit, the Commission to guarantee that "all subscribers *receive* (*not just have the capability of receiving*) all must-carry stations," or to require cable operators to provide (presumably for free) their customers with a converter box for every analog TV connected to a cable system.[28]

Section 614(b)(7) makes clear that broadcast signals "viewable" only with a converter box are considered "viewable."[29] NAB admits as much. NAB's own website makes clear that a digital signal is "viewable" with a converter box, and confirms that attaching a converter box is no big deal: "A DTV converter box is an *easy-to-install* electronic device that hooks up to your analog television set . . . and converts the digital television signal into analog, *making it viewable on your analog TV*."[30]

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[26] 47 U.S.C. § 534(b)(7) (emphasis added).

[27] NAB Comments at 12 (emphasis added).

[28] Discovery Comments at 3 (emphasis added); *see* Time Warner Comments at 22-24; Block Communications Comments at 4-5; NCTA Comments at 10-11; ACA Comments at 3-4. "Moreover, contrary to its assertion that 'all cable subscribers today are able to view all of their must-carry stations,' the Commission, up to this point, has specifically allowed a digital-only must-carry station to decide for itself whether or not it wishes to be downconverted and carried in analog, even though that means a station that does not elect to be downconverted will not be viewed by analog-only subscribers." Discovery Comments at 4.

[29] 47 U.S.C. § 534(b)(7).

[30] NAB, *Converter Box Details* (emphasis added), *at* http://www.dtvanswers.com/dtv_converterbox.html (last visited Aug. 16, 2007). "DTVAnswers.com is the official Web site of the National Association of Broadcasters' digital television (DTV) transition campaign." NAB, *Who We Are*, *at* http://www.dtvanswers.com/dtv_who.html (last visited Aug. 16, 2007).

Section 614(b)(7) further provides that a cable operator complies with the viewability requirement simply by "offer[ing] to sell or lease" converter boxes to its subscribers.[31] Subscribers are the ones empowered to make the ultimate decision as to whether they want to buy or lease a converter box to watch the broadcast stations (or cable channels) that are viewable only with a converter box. But, contrary to NAB's claims and the *Notice*'s assumption, the statute does not authorize the Commission to require a cable operator to transmit broadcast signals in another format for so long as one single customer chooses not to buy or lease a converter box to view them.[32] Nor does the statute authorize the Commission to require a cable operator to force its customers to obtain converter boxes, either for free or at a cost.[33] The assertion that the Commission's proposal comports with the statute because the cable operator has the "discretion" to choose dual carriage or to provide its customers with converter boxes is flatly wrong. The Commission lacks the authority to mandate that a cable operator choose between two options, each of which the Commission lacks the authority to impose individually.

Finally, as Comcast explained in its comments, based on the U.S. Court of Appeals for the D.C. Circuit's decision in *American Library Ass'n v. FCC*,[34] the viewability requirement,

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31 47 U.S.C. § 534(b)(7).

32 *See* NCTA Comments at 10 ("Nothing about this provision suggests that cable operators must provide broadcast signals in a different format than transmitted over-the-air.").

33 NCTA Comments at 11-12, 23 ("Forcing [half of all cable customers] to install digital boxes on their television sets simply in order to receive must-carry broadcast stations is 'no choice at all.'"); Discovery Comments at 3 ("However, given that very few cable systems will qualify for the second option, the first option, a substantial increase in cable operators' must-carry obligations, is the only real alternative."); Time Warner Comments at 23 ("There is no evidence that Section 614(b)(7) was ever read to require cable operators to force boxes on unwilling recipients. That is not surprising, because the term 'viewable' plainly need not be read that way -- no more than it must be read to require cable operators to come to subscribers' homes to fix broken TV sets."); Comcast Comments at 34 & n.102. As NCTA notes, forcing cable operators to provide converter boxes "would be 'inconsistent with section 629 of the Act,' which was 'enacted to ensure the commercial availability of navigation devices.'" NCTA Comments at 11 (quoting *2001 DTV Order* ¶ 79); *see* Time Warner Comments at 22.

34 406 F.3d 689 (D.C. Cir. 2005).

which applies only to "television receivers," cannot properly be construed to apply to analog TVs after broadcasters stop transmitting an analog broadcast signal, at which time they cease to be "television receivers."[35] NAB asserts that "[t]he Commission is correct that analog television sets will, after the transition, continue to be 'television receivers' for purposes of the viewability provision."[36] But the Commission has acknowledged elsewhere that the D.C. Circuit's opinion undermines such a conclusion: "[T]he Commission lacked jurisdiction over devices that can be used for receipt of wire or radio communications when those devices are *not* engaged in the process of radio or wire transmission."[37] As Comcast explained, "There is nothing in the statute -- or in logic -- that suggests a device that is no longer capable of receiving an over-the-air broadcast signal should continue to be treated as a television receiver."[38]

C. There Are Significant Constitutional Infirmities with the Dual-Carriage Proposal.

Virtually every commenter that addressed the constitutional implications of the dual-carriage proposal agreed that it presents very serious First Amendment problems, with some seeing Fifth Amendment infirmities as well. Only NAB tries to explain why it believes dual must-carry is constitutional -- a task the Commission conspicuously avoided in the instant *Notice*.[39] But, as the Commission previously concluded twice based on a substantial record,

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35 Comcast Comments at 23; NCTA Comments at 12 n.14.

36 NAB Comments at 7 n.7.

37 *In re Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report & Order, 22 FCC Rcd. 8776 ¶ 17 (2007) (emphasis in original) (citing *American Library Ass'n*, 706 F.3d at 703).

38 Comcast Comments at 23; *see* NCTA Comments at 12 & n.14.

39 The text of the *Notice* does not contain the slightest acknowledgment of any constitutional issues. In contrast, three out of five Commissioners acknowledge that there are constitutional issues to examine. *See Notice*, 22 FCC Rcd. at 8822 (Separate Statement of Commissioner Michael J. Copps) ("I recognize that some may argue there are practical or constitutional reasons we cannot achieve both goals simultaneously . . . ."); *id.* at 8823

(footnote continued…)

NAB's arguments are without merit. As NAB Executive Vice President Douglas Wiley recently explained regarding a different Commission proceeding, "the FCC process *is not a game* and *they cannot have a do-over*."[40]

As an initial matter, NAB identifies no important government interest that will be furthered by a duplicative carriage requirement.[41] NAB skips right over this essential requirement to address the question of whether the proposal would unduly burden cable operators' First Amendment rights and repeats its shopworn claim that the burden of dual carriage on cable operators will be nonexistent because cable operators have increased the capacity of their systems.[42] The Commission has twice rejected this argument.[43]

(…footnote continued)

(Separate Statement of Commissioner Jonathan S. Adelstein) (noting that "[t]here are important constitutional, technical, economic, and equity-based concerns" with dual carriage); *id.* at 8826 (Separate Statement of Commissioner Robert M. McDowell) ("I have questions about the possible statutory and constitutional implications involved in this proposed endeavor, particularly with respect to mandating carriage of a broadcast signal in both analog and digital formats.").

[40] *CommDaily Notebook*, *The NAB Criticized Microsoft's Call for Testing*, Communications Daily, Aug. 16, 2007, at 8 (emphasis added).

[41] Comcast, NCTA, and others thoroughly analyzed why the Commission's proposal will not further an important government interest. *See* Comcast Comments at 27-32; Charles J. Cooper & Brian Koukoutchos, Cooper & Kirk, *The Commission's Proposed Digital Carriage Requirement Would Violate the Constitution* 13-19 (July 16, 2007) ("*Cooper Paper*"), *appended to* NCTA Comments; Discovery Comments at 10; NCTA Comments at 20-23; Time Warner Comments at 10-13.

[42] *See* NAB Comments at 13-15; *see also* NAB Comments, CS Docket No. 98-120, at 33 (Oct. 13, 1998) (arguing that "it's reasonable for the Commission to conclude that cable capacity will have grown by such an extent that carriage of both analog and digital signals at the height of the transition will occupy a smaller percentage of cable capacity than did analog broadcast signals alone when must carry went into effect in 1993"); *id.* App. A 18-21 (Statement of Jenner & Block) (claiming that the "burden imposed by mandatory carriage of both digital and analog signals will be small"); *id.* App. D (appending John Haring et al., Strategic Policy Research, *Cable System Capacity: Implications for Digital Television Must-Carry* (Oct. 13, 1998)).

[43] *See 2001 DTV Order* ¶ 3; *2005 DTV Order* ¶ 15. Although then-Commissioner Martin issued a separate statement to the *2005 DTV Order*, dissenting in part and approving in part, the separate statement expressed disagreement *only* with the Commission's decision that broadcasters are not entitled to must-carry rights for their multicast signals, *not* the decision that dual must-carry is unconstitutional. *See 2005 DTV Order*, 20 FCC Rcd. at 4548 (Separate Statement of Commissioner Kevin J. Martin).

In its *2001 DTV Order*, after seeking to build a "record on available channel capacity for digital carriage purposes and help the Commission determine the speech burden on cable operators under the First Amendment and the *Turner* cases,"[44] the Commission tentatively concluded that "a dual carriage requirement appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interests."[45] The Commission, however, decided to build an even better record on the issue, and sought additional comment in an FNPRM issued with the *2001 DTV Order*.[46] Four years later, despite NAB's additional comments and ex parte filings,[47] the Commission again concluded that "the burden that mandatory dual carriage places on cable operators' speech appears to be greater than is necessary to achieve the interests that must-carry was meant to serve."[48]

NAB now asserts yet again that "any cable capacity issues that may have once given rise to First Amendment concerns are long a thing of the past."[49] But the third time is not the charm. As NCTA explained,

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44 *2001 DTV Order* ¶ 123.

45 *Id.* ¶ 3.

46 *See id.* ¶¶ 123-127.

47 *See* Letter from Marsha J. MacBride, Executive Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, CS Dkt. No. 98-120, at 2 (Jan. 25, 2005) (arguing that "given the explosion of cable capacity and the lack of any increase in the absolute burden, the *relative* burden imposed by carriage of the full video DTV stream is a fraction of that approved in the *Turner* cases"); Letter from Jack N. Goodman, Senior Vice President & General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, CS Dkt. No. 98-120, at 1-2 (Aug. 5, 2002) ("August 2002 NAB Letter") ("As NAB has previously established in this proceeding, carriage of *both* the analog and digital signals of all local commercial television stations would occupy a far smaller percentage of cable capacity than did carriage of only analog stations when the must carry statute went into effect."); Donald B. Verrilli, Jr. & Ian Heath Gershengorn, Jenner & Block, LLC, *A Constitutional Analysis of the "Primary Video" Carriage Obligation: A Response to Professor Tribe* 6 (attached to August 2002 NAB Letter) ("[A]s a relative matter, the burden to be imposed by mandatory carriage of digital signals is significantly less than the burden approved in the Turner cases, because cable capacity has increased exponentially, . . . indeed, even carriage of both the analog and the digital signals will use less capacity as a percent of total cable capacity[.]").

48 *2005 DTV Order* ¶ 15.

49 NAB Comments at 13.

> Cable operators are vigorously competing against new entrants and DBS on the quality and breadth of their service offerings. Operators are "scrambling to carve out bandwidth," looking to add more HD services to compete against DIRECTV's proposed 150 channel HD offering. Even today, before the end of the broadcasters' transition, some programmers are being forced to vacate their analog tier slots. Programmers are being moved from analog to digital tiers so operators can reclaim the 6 MHZ of capacity for digital uses.[50]

Digital programming capacity is tight, with programmers competing fiercely for digital carriage.[51] This is even more true today as cable operators and DBS providers attempt to distinguish their services by offering increasingly more HD programming.[52]

The dual-carriage proposal would exacerbate the situation, since it would increase the bandwidth that cable operators would have to devote to each must-carry station. The current requirement that cable operators dedicate 6 MHz of their capacity to each broadcaster would, according to NCTA, increase by at the *very least* an additional 1 MHz (for analog plus standard-definition digital carriage) and more likely an additional 3 MHz (for analog plus a digital HD

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[50] NCTA Comments at 19 (internal citations omitted); *see* Time Warner Comments at 5. In responding to NAB's cable capacity argument when it was made in the past, Professor Laurence Tribe explained that "[p]ast predictions of 'surplus' channels have been proven false. Experience shows that the number of program services vying for carriage has always expanded faster than available channels. . . . Therefore, no one can have any confidence that cable systems will have excess capacity when the digital transition is completed." *See* Laurence H. Tribe, *Why the Federal Communications Commission Should Not Adopt a Broad View of the "Primary Video" Carriage Obligation* 6 (2002) ("*Tribe I Paper*"), *attached to* Letter from Daniel. L. Brenner et al., NCTA, to Marlene Dortch, Secretary, FCC, CS Dkt. No. 98-120 (July 9, 2002) ("NCTA July 9, 2002 Letter").

[51] *See* Time Warner Comments at 5 ("[C]able programmers are locked in a fierce battle for carriage, with many programmers being unable to secure any carriage (analog or digital) for their services.").

[52] *See id.* ("The demand for capacity is made all the more acute by the trend toward high definition programming."); Phillip Swann, *Comcast: 800 HDTV Channels? The War of Words Between Cable and Satellite Escalates*, TVPredictions.com, June 12, 2007 ("DIRECTV says it will carry 100 High-Definition channels by year's end. But the nation's largest cable operator says you ain't seen nothing yet. In the latest skirmish between cable and satellite over high-def, Comcast officials are telling industry groups that it will have 400 HDTV channel choices by year's end."), *available at* http://www.tvpredictions.com/comcast800061207.htm. DBS providers and cable operators are also battling over HD picture quality. *See* Linda Moss, *DirecTV's HD Suit vs. Comcast: Oct. 22*, Multichannel News, July 23, 2007, *available at* http://multichannel.com/article/CA6462424.html.

signal).[53] And, for every additional broadcast stream cable operators are forced to carry, the vast majority of cable operators will be forced to make corresponding reductions in their carriage of existing non-broadcast networks (or diminish the capacity dedicated to valuable other services like high-speed Internet or VoIP).[54]

NAB attempts to alleviate the deficiency in its capacity argument by characterizing dual must-carry as only one "alternative,"[55] and claiming that some "operators may instead conclude that the cost of providing subscribers who have analog sets with set-top converters is justified by the reduction in capacity used for local signals."[56] But this "alternative" is a chimera. As NCTA explains, the second "option" is not an option at all because it would mean forcing cable operators or customers to attach and pay for a converter box for every analog TV that may be connected to the cable system in February 2009, at an estimated cost of $6.3 billion.[57] Time Warner adds that there would be only one real "option" for cable operators under the proposal in the *Notice*, since "many customers currently choose not to use set-top boxes on one or more of their television sets, [so] most cable operators have not switched to all-digital distribution and

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[53] *See* NCTA Comments at 18-19 ("Here, at the *very least* an operator would need to devote 7 MHz to carriage of an analog plus a standard definition version of the same signal indefinitely . . . .") (emphasis in original).

[54] *See generally* NCTA July 9, 2002 Letter (attaching the *Tribe I Paper*); Letter from Daniel. L. Brenner et al., NCTA, to Marlene Dortch, Secretary, FCC, Dkt. No. 98-120 (Nov. 24, 2003) (attaching a paper from Professor Laurence H. Tribe entitled *Why the Federal Communications Commission Should Not Adopt a Broad View of the "Primary Video" Carriage Obligation: A Reply to the Broadcast Organizations*).

[55] NAB Comments at 15 ("Even if cable operators could demonstrate that carriage of both digital and analog signals after February 2009 somehow constrained their capacity in a meaningful way . . ., the Commission's proposal to give them the alternative of providing converter boxes to their subscribers with analog receivers would resolve any constitutional questions.").

[56] NAB Comments at 10.

[57] *See* NCTA Comments at 6.

may not do so for some time."[58] Moreover, according to Chairman Martin, no consumer should have to buy or lease a converter box.[59] If that view prevails, cable operators could *never* avoid the dual-carriage requirement by going all-digital.

While broadcasters and the Commission brushed over the serious constitutional issues at stake, cable interests offered thoughtful analyses grounded in real-world facts and authoritative precedent. In the past, the Commission "recognized that, to the extent that the Commission imposes a dual carriage requirement, cable operators could be required to carry double the amount of television signals, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited."[60] This is precisely what the *Notice* now proposes to do.

Many commenters pointed out that the *Notice*'s dual-carriage proposal would share the same constitutional infirmities as the dual-carriage proposal the Commission has twice rejected as unconstitutional.[61] Specifically, commenters explained that dual must-carry would not further any important governmental interest -- neither the two that were recognized by a majority of the Supreme Court as legitimate in 1994, nor any other asserted-but-not-judicially-approved interests invoked by broadcasters.[62] And, even if duplicative carriage would further an important

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58 Time Warner Comments at 3. Time Warner also explains that "[t]urning cable systems into 'all-digital' systems would require an enormous investment: every subscriber would have to either buy a digital TV set or lease a digital set-top box. . . . Thus, as a practical matter, most cable operators do not have the option of going 'all-digital' immediately." *See id.* n.4.

59 *See Notice*, 22 FCC Rcd. at 8820 (Separate Statement of Commissioner Kevin J. Martin).

60 *2001 DTV Order* ¶ 9.

61 *See* NCTA Comments at 13-24; Comcast Comments at 25-37; ACA Comments at 4 & n.11.; Time Warner Comments at 15; Discovery Comments at 10; Block Communications Comments at 4.

62 *See* NCTA Comments at 20-23; *Cooper Paper* at 13-19; Comcast Comments at 27-32; Discovery Comments at 10-11; ACA Comments at 4; Time Warner Comments at 10-13.

governmental interest, the burdens it would impose on cable operators' and programmers' First Amendment rights would far exceed the burdens barely found tolerable, under the less competitive marketplace conditions of the early 1990s, in *Turner II*.[63] The substantial changes in the video marketplace that have occurred in intervening years dramatically reduce the constitutional justification for *any* must-carry rule and make an expanded obligation unthinkable.[64]

In addition to violating cable operators' First Amendment rights, the Commission's proposal would violate their Fifth Amendment rights.[65] As the *Cooper Paper* submitted by NCTA explains, "A dual carriage rule would, absent the payment of just compensation to the cable companies, violate the Takings Clause" because "[s]uch a rule would grant a broadcaster exclusive use of a portion of a cable company's system indefinitely and thereby effect a permanent physical occupation of that property."[66] And "it would do so *without compensation*, insofar as the law expressly forbids cable companies from receiving compensation from

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[63] *See* NCTA Comments at 17-20; *Cooper Paper* at 5 ("Insofar as compulsory analog carriage of a broadcast station already carried digitally would consume 6 MHz of cable spectrum that could otherwise carry multiple digital channels of programming, the Commission's proposed analog must-carry requirement would not merely double the burden on free speech identified by the Supreme Court in *Turner*, *it would multiply that burden by several times*. The First Amendment prohibits laws 'abridging the freedom of speech, not laws regulating the use of electromagnetic spectrum, and the burden on free expression is measured in terms of the amount of speech suppressed, not the number of megahertz consumed by the broadcaster.") (emphasis in original) (internal citations omitted); Comcast Comments at 33-35; Discovery Comments at 10-11; Time Warner Comments at 13-15.

[64] Comcast Comments at 27; Time Warner Comments at 15-17; NCTA Comments at 16; *Cooper Paper* at 13.

[65] Comcast Comments at 35-36; NCTA Comments at 25-26; *Cooper Paper* at 19-31.

[66] *Cooper Paper* at 19; *see id.* at 20-25. The *Cooper Paper* also explains why a dual-carriage requirement would effect a regulatory taking. *See id.* at 26-29.

broadcasters for must-carry."[67] "The Commission should avoid imposing any must-carry rule that would raise serious takings issues," as the dual-carriage proposal inevitably does.[68]

D. The Current Material Degradation Standard Works and Commenters Provide No Reason To Change It.

Broadcasters propose a bevy of new cable regulations without providing any sound justification for the proposed changes. For example, NAB seeks new regulations to govern, among other things, conversion, formatting, bit measurements, and complaint procedures.[69] Broadcasters also urge the Commission to adopt the same "all bits" requirement the Commission expressly rejected six years ago, but provide no evidence why the Commission now needs to change its rules or its prior interpretation of the Communications Act that found that an "all bits" requirement was contrary to the statute.[70] These proposals should be squarely rejected. As Block Communications notes, "The proposed obligations in the *Second FNPRM* would shift costs of the DTV transition to our cable operations and cable subscribers. As a broadcaster, we do not need this 'help' to distribute our DTV signals."[71]

The need for new material degradation rules is uniformly and strongly refuted by cable operators. As AT&T explains, "In the six years since the *First Report and Order* was adopted, no new facts, or marketplace or technological developments have emerged to call into question the Commission's conclusion that the 'issue of material degradation is about . . . picture quality .

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67 *Id.* at 19 (emphasis in original) (citing 47 U.S.C. § 534(b)(10)).

68 *Cooper Paper* at 30.

69 *See* NAB Comments at 20-28.

70 *See, e.g.* NAB Comments at 19-20; Agape Comments at 1.

71 Block Communications Comments at 5.

. . *and not about the number of bits transmitted* . . . if the difference is not really perceptible.'"[72] Likewise, "Qwest does not believe that [an "all bits"] standard is necessary or makes sense as a material degradation standard. . . . A requirement that a cable operator carry all of a DTV must-carry station's primary video and program-related content bits is not a 'material degradation' standard, it is a 'no degradation' standard."[73]

The Commission's material degradation proposal "may serve broadcaster's interests but will do little, if anything, to promote the public interest."[74] The proposal would harm consumers by preventing cable operators from using their bandwidth efficiently. *Every modern MVPD uses compression technology* to maximize the bandwidth it has available to provide the services and quality their customers want. Limitations on cable operators' ability to efficiently and dynamically manage their network capacity will harm consumers and place cable operators at a competitive disadvantage vis-à-vis their competitors. Moreover, as Discovery pointed out, the Commission's proposal limiting cable's flexibility to use digital compression would "shrink[] the number of channels that a system can offer" to its subscribers.[75]

The majority of commenters addressing the issue agreed that there is no need for the Commission to change its material degradation complaint procedures.[76] Even NAB opposed the

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[72] AT&T Comments at 2 (quoting the *2001 DTV Order* ¶ 72 (emphasis added)); *see* Comcast Comments at 7-12; Qwest Comments at 2; NCTA Comment at 26-31; ACA Comments at 8; Time Warner Comments at 24-29.

[73] Qwest Comments at 3; *see* Comcast Comments at 10 ("[A] requirement that all content bits be carried would read the word 'material' out of the statute.").

[74] AT&T Comments at 5-6.

[75] Discovery Comments at 6.

[76] Comcast Comments at 12-15; *see* Time Warner Comments at 28-29 ("[A]llowing individual broadcasters to decide whether cable operators' transmissions are adequate would be unworkable. This approach would add heavy transaction costs: cable operators would have to bargain with each must-carry station in addition to each retransmission-consent station."); AT&T Comments at 5; NCTA Comments at 30-31.

Commission's proposal to require cable operators to negotiate with broadcasters over this issue.[77]

III. OTHER ARGUMENTS RAISED HAVE NO BEARING ON THIS PROCEEDING AND SHOULD BE DISREGARDED.

Some commenters use this proceeding to raise unrelated or already-resolved issues. The Commission should summarily dismiss the proposals described below.

Multicast Must-Carry. Agape attempts to expand digital carriage obligations to include multicast broadcast signals under the guise of proposing a technical standard. Specifically, Agape asserts that: "[a]ll program-related bits should be required to be sent to cable subscribers. All free broadcast multicast channels should be passed on" as well.[78] However, as the Commission specified in the *Notice,* it is already settled that "[b]its that are not part of the primary video or program-related content need not be carried."[79] Agape's efforts to procure a requirement for carriage of multiple programming streams for each broadcast licensee should be rejected.

Low Power TV. United Communications Corp. urges the Commission to extend must-carry obligations to all low power TV stations by "modify[ing] Section 76.55(d) of its Rules to eliminate subparagraph (6)."[80] The Commission has no authority to do so. Its rule precisely

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[77] NAB Comments at 27-28 ("NAB and MSTV oppose the Notice's suggestion that broadcasters -- even stations electing mandatory carriage -- be required to enter into negotiations with cable operators over a cable operator's desire to strip bits from the signal.").

[78] Agape Comments at 1.

[79] *See Notice* ¶ 12 n.21 (citing *2001 DTV Order* ¶ 57); *2005 DTV Order* ¶ 33 ("After consideration of all the arguments and evidence presented on this issue, we affirm our earlier decision, and decline, based on the current record before us, to require cable operators to carry any more than one programming stream of a digital television station that multicasts.").

[80] UCC Comments at 9.

follows the statute; the definition of a "Qualified Low Power Station" entitled to must-carry rights is set forth in Section 614(h)(2) and includes "subparagraph (6)."[81]

Equipment Issues. CEA raises issues that are entirely irrelevant to the must-carry issues raised in the *Notice*. CEA has raised these issues *ad nauseum* in the navigation device/equipment compatibility dockets, and that is where they should be considered (and rejected), not here. The Commission should take note, however, that CEA's "solution" for analog customers is to have them go out and buy new digital devices.[82] That may serve the interests of CEA members, but it is not the least bit responsive to the Commission's stated concern about protecting the owners of existing analog televisions.

The Commission should be aware that CEA's proposals would harm consumers by preventing innovation and skewing competition. For example, CEA asks the Commission to impose rules barring use of switched digital video and advanced compression technologies to transmit digital broadcast signals,[83] knowing full well that these technologies have the potential to free up scarce cable bandwidth for more HD channels, faster Internet speeds, and other services customers want and value. In fact, such technologies were among the positive developments that the Commission reported to Congress last year: "The video industry is evaluating the use of advanced compression technologies . . . . These advances are expected to

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81 *See* 47 U.S.C. § 534(h)(2).

82 *See* CEA Comments at 7 ("The integration of QAM tuning into 'affordable' multi-purpose products such as DVD recorders offers a tremendous opportunity for the fifty percent of all cable customers who are the focus of this rulemaking . . . ." (internal quotation marks added)).

83 *See* CEA Comments at 8-10.

allow existing video delivery services to provide more programming and to decrease barriers to entry for new entrants to the MVPD market."[84]

Cable's competitors would not be encumbered with the types of technological restrictions CEA proposes, so adopting those proposals would skew marketplace competition and violate policies of technological neutrality. It is bad enough that the *Notice* contains proposals that would have the effect of chilling innovation and skewing competition, but it is worse still that CEA so blatantly advocates these obviously undesirable results.

Encryption and Technology Mandates. Other CEA proposals are contrary to the plain language of the Communications Act and Commission's rules. For example, CEA proposes that broadcast signals be unencrypted in all circumstances.[85] Comcast does not encrypt broadcast signals today, but plainly has the right and ability under the Act and the rules to encrypt those signals in cable systems determined to be subject to effective competition and thereby freed of rate regulation requirements. Plus, Congress has expressly forbidden the Commission to take actions that jeopardize the security of MVPD services,[86] and the interests of CEA's members have been more than fully secured -- at least in the case of cable operators -- by the rule that requires cable operators to provide equipment (like the CableCARD) that performs any necessary decryption of encrypted signals.[87]

Finally, CEA's hypocrisy on the issue of technology mandates is glaring. CEA decries the costs and consumer harms associated with the DTV tuner mandate, but it has no qualms

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84 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 25 (2006).

85 *See* CEA Comments at 6-8.

86 47 U.S.C. § 549(b).

87 47 C.F.R. § 76.640(b)(3).

about foisting substantial new and costly regulations on cable operators.[88] CEA appears to be of the view that government rules are unnecessary and burdensome when applied to its own members, but are magically transformed into "marketplace solutions" when imposed on cable operators. That position has no credibility.

[88] *Compare* CEA Comments at 4 ("The Tuner Mandate . . . imposed expenses that were unnecessary for most consumers."), *with id.* at 5 ("[I]t is vital that cable operators carry digital broadcasts that are (a) in the clear, (b) not subject to codecs that are incompatible with receivers covered by the Tuner Mandate, and (c) not subject to 'switched digital' transmission that would make this programming unavailable to such receivers.").

IV. CONCLUSION.

The record in this proceeding confirms that the Commission's prior conclusions concerning dual carriage and material degradation were correct. Commenters have amply demonstrated that the proposals in the *Notice* are unnecessary and unlawful. Just as the *Notice* failed to provide any rational bases for revising the Commission's prior conclusions and rules, commenters advocating adoption of the Commission's proposals similarly neglect to provide such a justification. Rather, the record makes clear that the Commission's proposals are statutorily and constitutionally infirm and should not be adopted.

Respectfully submitted,

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